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INTEREST OF AMICUS CURIAE CITY OF ERIE.

The City of Erie, Pennsylvania's third largest city, is a governmental subdivision of the Commonwealth of Pennsylvania with a population of approximately 140,000. Erie's public school enrollment is in excess of 22,000, and approximately 11,000 additional pupils are enrolled in some 21 elementary and 5 secondary non-public schools. Erie is not immune from the educational and financial crises which besiege Pennsylvania's public and non-public school systems: a shortage of textbooks and supplies, overcrowding, double shifts, the adaptation of non-classroom spaces for class instruction, and increased enrollments. Erie's schools are not only crowded, but tend to be old and in need of modern equipment. Erie's 1970 public school budget has already compelled a difficult tax increase, and its public school operating budget of $18.8 million faces a one-half million dollar deficit, exclusive of capital outlay and federal programs. Erie's "newest" public school is now 15 years old. At least a $10 million capital improvement program is desperately needed. These conditions, which severely jeopardize the quality of urban education, also militate against the social and economic future of the entire metropolitan Erie community.

Recognizing that Pennsylvania's non-public schools provide a definite secular and public welfare service, the Pennsylvania State Legislature responded to this educational crisis by enacting the Public Elementary and Secondary Education Act of 1968, 24 Purdon's Pa. Stat. Annot., §5601, *et seq.* (hereinafter "Act") to insure that the Commonwealth's public and non-public school systems would continue to provide the competent secular education necessary to enhance the general quality of life in the Commonwealth. The Act specifically found that should a majority of the present non-public school pupils transfer to public

schools, Pennsylvania would be confronted with "an intolerable added financial burden". (24 Purdon's Pa. Stat. Annot., § 5602(6).) The City of Erie simply could not meet the tax burden of an additional $7,843,444 operating budget directly attributable to the transfer of present non-public school pupils to Erie's public schools. Additional millions of tax dollars would be required for capital expenditures.

Accordingly, the City of Erie supports the Commonwealth's purchase of specifically designated secular educational services from qualified non-public schools, and submits this brief *Amicus Curiae* which underscores the Act's compatibility with the Establishment Clause of the First Amendment.*

* This Brief discusses only the arguments made by Appellants on the Establishment Clause. The City of Erie, however, fully supports the decision of the Court below in all respects.

ARGUMENT.

The Act's Primary Purpose and Primary Effect Are Secular.

In responding to the crises confronting Pennsylvania's public and non-public school systems, the Legislature specifically found "the imperative need to spur the maximum educational development of every young American's educational capacity." (24 Purdon's Pa. Stat. Annot., § 5602.) The Legislature also specifically delineated the economic and social realities underlying this educational challenge: rapidly increasing costs, a rising school population, consequent demands for more teachers and facilities, inflation, and the competing demands of other modern state governmental responsibilities for limited tax dollars.

To provide all Pennsylvania children with quality secular educational services in four specified subjects—mathematics, modern foreign language, physical science, and physical education—the Legislature carefully built quality and fiscal controls into the Act. The Act's funds, including administrative funds, accrue in a separate State Horse Racing Fund which cannot affect any public school funds. (24 Purdon's Pa. Stat. Annot., §§ 5606(a), 5607(a).) No reimbursement assistance can be received by any school until acceptable secular educational services have been rendered. As a condition for the purchase of the specified secular educational services, the State Superintendent of Public Schools approves textbooks and other instructional materials, and approves the attainment of a satisfactory level of pupil performance in standardized tests. By 1973, all non-public school teachers must attain certification standards, again approved by the State Superintendent, equal to public school teacher standards. (24 Purdon's Pa. Stat. Annot., § 5604.)

In urging this Court to nullify the Act, and to substitute their judgment of the public welfare for that of the

Legislature, Appellants' principal argument is that the Act is constitutionally deficient under the Establishment Clause of the First Amendment. Each of the Appellants' arguments ultimately rests upon an unrealistic monolithic view of parochial schools. Thus, Appellants characterize, in absolutistic terms, all such schools as "schools whose entire raison d'etre is religious and in which religious instructions, symbols, readings, and ceremonies abound." (Appellants' Brief, p. 22.)

This basic premise of each of Appellants' arguments is squarely at odds with this Court's well-settled holdings that parochial schools in fact pursue two distinct goals—religious instruction and secular education. *Pierce v. Society of Sisters,* 268 U. S. 510 (1925). This Court has repeatedly held that the state can advance legitimate secular, public welfare goals through sectarian institutions. "The First Amendment . . . does not say in every and all respects that there shall be a separation of church and state." *Zorach v. Clauson,* 343 U. S. 306, 312 (1952). Again, in *Board of Education v. Allen,* 392 U. S. 236 (1968) this Court recognized the legitimate secular educational contributions of non-public schools:

> "However, this Court has long recognized that religious schools pursue two goals, religious instruction and secular education.
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> "Underlying these cases, and underlying also the legislative judgments that have preceded the court decisions, has been a recognition that private education has played and is playing a significant and valuable role in raising national levels of knowledge, competence, and experience. Americans care about the quality of the secular education available to their children. They

have considered high quality education to be an indispensable ingredient for achieving the kind of nation and kind of citizenry that they have desired to create. Considering this attitude, the continued willingness to rely on private school systems, including parochial systems, strongly suggests that a wide segment of informed opinion, legislative and otherwise, has found that those schools do an acceptable job of providing secular education to their students. *This judgment is further evidence that parochial schools are performing, in addition to their sectarian function, the task of secular education."*[1] 392 U. S. 245, 248-49 [Emphasis supplied]

Since this Court has long recognized that non-public schools can indeed perform a secular educational function, Appellants' argument is reduced simply to the proposition

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1. Pennsylvania courts have long constitutionally sanctioned the attainment of public welfare secular goals through sectarian institution. See *Schade v. Allegheny County Institution District,* 386 Pa. 507 (1956). In sustaining the constitutionality of the Pennsylvania statute requiring school boards to provide comparable free bus transportation to both public and non-public elementary and high school pupils, the Pennsylvania Supreme Court observed "the high budgets required to maintain our public school system is a matter of concern to everybody. The imperative need for the best in education for the youth of our Commonwealth convinces the civic minded citizens of the inevitability of heavy taxes to meet the expense, but it does not lessen the weight of the financial burden he must carry. Therefore, any procedure which may lighten that burden consistent with maintaining the highest state educational standards is warmly welcomed by the taxpayers". That court noted that Pennsylvania's non-public school system financially benefits Pennsylvania taxpayers in an amount equal to one-third of the Commonwealth's entire educational budget. "Indeed if non-public schools were to be abolished, the increase in tax burden to the citizens of the Commonwealth would be noteworthy and the Commonwealth would be hard put to provide the buildings, teachers, and equipment for the flood of additional children released into their care and responsibility." *Rhoades v. Abington Twp. Sch. Dist.,* 424 Pa. 202, 209, 210 (1967). It has been conservatively estimated that to absorb Pennsylvania's approximately 600,000 non-public school children into the public schools would take a prohibitive 400 new schools, 20,000 new teachers, and $400 million. *Philadelphia Evening Bulletin,* April 6, 1969.

that an illicit purpose of benefitting non-public schools can be gleaned from a selective recourse to the comments of a few legislators. This attempt at "guesswork," in discerning the motives of the legislature "on the basis of what fewer than a handful of Congressmen[2] said about it," *United States v. O'Brien*, 391 U. S. 367, 384 (1968), collides with the well-established constitutional principle that this Court will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive. As this Court recently noted, *United States v. O'Brien*,[3] *supra*, at 383-384, in refusing to look beyond the valid legislative purpose set forth on the face of a statute in a First Amendment case:

> "Inquiries into Congressional motives or purposes are a hazardous matter. When the issue is simply the interpretation of legislation the court will look to statements by legislators for guidance as to the purpose of the legislature, because the benefit to sound decision-making in these circumstances are sufficient to risk the possibility of misreading Congress' purpose. *It is entirely a different matter when we are asked to void a statute if it is under well-settled criteria, constitutional on its face, on the basis of what fewer than a handful of Congressmen said about it.* What motivates one legislator to make a speech about a statute is not necessarily what motivates scores of others to enact it and

2. For example, the remarks of only two legislators in the State Senate are seized upon as evidence of the entire Senate's purpose by Appellants. See Appellants' Brief, Add. p. 10.

3. *O'Brien, supra*, at 385, also distinguishes *Grosjean v. American Press Co.*, 297 U. S. 233 (1936) and *Gomillion v. Lightfoot*, 364 U. S. 339 (1960), two of the cases specifically relied upon by Appellants (pp. 28, footnote 7, and 30) and characterizes their holdings as standing "not for the proposition that legislative motive is a proper basis for declaring a statute unconstitutional. . . . ." 391 U. S. at 384.

the stakes are sufficiently high for us to eschew guesswork. *We decline to void essentially on the ground that it is unwise legislation which Congress had the undoubted power to enact and which could be reenacted in its exact form if the same or another legislator made a 'wiser' speech about it''.* [Emphasis supplied.]

The Act's primary effect of providing quality secular educational services to all Pennsylvanians neither advances nor inhibits religion. The Act's incentive will raise both student and teacher secular educational performance. In doing so, it opens new vistas of educational cooperation and achievement. President Nixon's March 3, 1970 Educational Message to Congress [4] noted a variety of tangible secular educational benefits emanating from the Act—i.e. enhanced educational diversity, educational innovation, and special opportunities for minorities. Indeed, in *Rhoades v. Abington Twp. Sch. Dist.*, 424 Pa. 202, 209, 210 (1967), the Pennsylvania Supreme Court found that the non-public school's annual saving to Pennsylvania taxpayers was an amount equal to one-third of the Commonwealth's total educational budget.

President Nixon told Congress that if most or all private schools were to close or turn public, the added burden on public funds by the end of the 1970's would exceed $4 billion per year in operation, with an estimated $5 billion more needed for facilities.

Thus, the Act's purpose and effect clearly fall within the ambit of the constitutionally sanctioned ''benevolent neutrality'' which permits religious institutions to exist without sponsorship and without interference. *Walz v. Tax Commission of the City of New York*, 397 U. S. 664, 669 (1970).

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4. *Weekly Compilation of Presidential Documents*, Vol. 6, No. 10, March 9, 1970, p. 312.

CONCLUSION.

The City of Erie, Pennsylvania, *Amicus Curiae*, respectfully submits that the issues raised by Appellants in this appeal were properly decided by the Court below, and that the judgment below should be affirmed in all respects.

Respectfully submitted,

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